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No. 96-1125

In the

# Supreme Court of the United States

October Term, 1996

In Re: The Inquiry of Evan W. Broadbelt, J.M.C.

On Petition for a Writ of Certiorari To The Supreme Court of New Jersey

## Brief in Opposition on Behalf of Respondent Advisory Committee on Extrajudicial Activities

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32 pp

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a sitting municipal court judge may make regular appearances on commercial television broadcasts, prominently identified as a judge, for the purpose of providing "color commentary" on pending criminal trials under Canons 3A(8) and 2B of the Code of Judicial Conduct.

2. Whether the application of Canons 3A(8) and 2B to petitioner's conduct violates his First Amendment rights where the Canons further the substantial governmental interest in preserving the independence and integrity of the judiciary and where the restriction on petitioner's conduct is no more restrictive than necessary to accomplish this aim.

3. Whether petitioner's due process rights were infringed where he never raised the due process claim below; the facts of the case are undisputed; he has not been deprived of any identified property or liberty interest, and where he instituted the proceedings at issue, fully briefed the matter, and orally presented his position to the New Jersey Supreme Court.

## TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED . . . . . i

COUNTERSTATEMENT OF THE CASE

I. Introduction . . . . . 1

II. Procedural and Factual Background . . . . . 3

ARGUMENT

THE SUPREME COURT LACKS JURISDICTION TO CONSIDER PETITIONER'S STATE LAW CLAIMS AND, IN ANY EVENT, PETITIONER HAS FAILED TO MEET THE STANDARDS FOR A GRANT OF CERTIORARI BECAUSE THE STATE COURT DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT AND THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT. . . . . 8

A.

BECAUSE PETITIONER WAS A SITTING JUDGE WHO WISHED TO PROVIDE "COLOR COMMENTARY" ON PENDING CRIMINAL TRIALS, THE NEW JERSEY SUPREME COURT CORRECTLY HELD THAT HIS REGULAR APPEARANCES ON COMMERCIAL TELEVISION PROGRAMS FOR THIS PURPOSE VIOLATED CANONS 3A(8) AND 2B OF THE CODE OF JUDICIAL CONDUCT . . . . . 11

B.

THE APPLICATION OF CANONS 3A(8) AND 2B TO PETITIONER'S CONDUCT CLEARLY DID NOT VIOLATE HIS FIRST AMENDMENT RIGHT TO FREE SPEECH. . . . . 20

C.

PETITIONER'S DUE PROCESS CLAIM WAS NOT RAISED BELOW AND, IN ANY EVENT, PLAINLY LACKS MERIT. . . . . 23

CONCLUSION . . . . . 25

## TABLE OF CITATIONS

### CASES CITED

Bishop v. Wood, 426 U.S. 341 (1976) . . . . . 24

Board of Regents v. Roth, 408 U.S. 564 (1972) . . . . . 24

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) . . . . . 7, 8, 21

Gruenburg v. Kavanagh, 413 F. Supp. 1132 (E.D. Mich. 1976) . . . . . 9, 24

In re Benoit, 523 A.2d 1381 (Ma. 1987) . . . . . 13

In re Del Rio, 256 N.W.2d 727 (Mich. 1977), app. dism. 434 U.S. 1029 (1978) . . . . . 24

In re Fadeley, 802 P.2d 31 (Ore. 1990) . . . . . 20

In re Hinds, 449 A.2d 483 (N.J. 1982) . . . . . 7, 8

In re Inquiry Relating to Rome, 542 P.2d 676 (Kan. 1975) . . . . . 20, 21

In re Miller, 644 So.2d 75 (Fla. 1994) . . . . . 19

In re Schenck, 870 P.2d 185 (Ore. 1994), cert. den. _____ U.S. _____, 115 S.Ct. 195 (1994) . . . . . 15, 16, 19, 21, 22

Isko v. Planning Board of Tp. of Livingston, 238 A.2d 457 (N.J. 1968) . . . . . 15

Matter of Blackman, 591 A.2d 1339 (N.J. 1991) . . . . . 17

Matter of Hey, 452 S.E.2d 24 (W. Va. 1994) . . . . . 21

Matter of Seaman, 627 A.2d 106 (N.J. 1993) . . . . . 3

O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978) . . . . . 24

Paul v. Davis, 424 U.S. 693 (1976) . . . . . 24

Pincham v. Illinois Judicial Inquiry Bd., 872 F.2d 1341 (7th Cir. 1989), cert. den. 493 U.S. 975 (1989) . . . . . 9

Ross v. Moffitt, 417 U.S. 600 (1974) . . . . . 11

Ryan v. Commission on Judicial Performance, 754 P.2d 724 (Cal. 1988) . . . . . 13

Sheppard v. Maxwell, 384 U.S. 333 (1966) . . . . . 13

Singleton v. Wolff, 428 U.S. 106 (1976) . . . . . 23

United States v. Garwood, 16 M.J. 863 (A.C.M.R. 1983), aff'd 20 M.J. 148 (C.M.A.), cert. den. 474 U.S. 1005 (1985) . . . . . 13

United States v. Johnson, 268 U.S. 220 (1925) . . . . . 10

NEW JERSEY STATUTES CITED

N.J.S.A. 2B:12-4 . . . . . 3

N.J.S.A. 2B:12-17 . . . . . 3

UNITED STATES STATUTE CITED

28 U.S.C. §1257 . . . . . 8, 9

NEW JERSEY CONSTITUTIONAL PROVISION CITED

N.J. Const. (1947), Art. 6, §3 . . . . . 9

NEW JERSEY RULES CITED

R. 1:18A-2 . . . . . 5

R. 1:18A-7 . . . . . 5

SUPREME COURT RULE CITED

Supreme Court Rule 10 . . . . . 10

## JUDICIAL CANONS CITED

Canon 2B . . . . . 1, passim

Canon 3A(8). . . . . 1, passim

## OTHER AUTHORITIES CITED

141 N.J.L.J. at Index Page 2270 . . . . . 7, 17

California Judicial Conduct Handbook . . . . . 14

Gross, "Judicial Speech: Discipline and the First Amendment," 36 Syracuse L. Rev. 1181 (1986) . . . . . 13

Guidelines for Extrajudicial Activities and Report of Supreme Court Committee on Extrajudicial Activities (Abridged), amended January 1995 . . . . . 5

Opinion 93-133 (New York) . . . . . 14

Opinion 94-17 (Arizona) . . . . . 18

Opinion No. 14-1991 (South Carolina) . . . . . 18, 19

Westin, "Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw," 62 Colum L. Rev. 663 (1962) . . . . . 12

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In the

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**Brief in Opposition to Petition for A Writ of Certiorari on Behalf of Respondent Advisory Committee on Extrajudicial Activities**

## COUNTERSTATEMENT OF THE CASE

### I. Introduction

The primary issue in this case is whether, under the New Jersey Supreme Court's Code of Judicial Conduct, a sitting New Jersey municipal court judge, prominently identified as such, may regularly appear on commercial television broadcasts to provide "color commentary" on pending criminal trials that are either being shown on, or are the subject of, the broadcasts. According to the chief executive officer of the company which sponsors these broadcasts, the purpose of the judge's appearances is to avoid having "a stacked deck program" on which only defense attorneys appear.

The New Jersey Supreme Court held that the appearances by the judge would violate Canons 3A(8) and 2B of the Code of Judicial Conduct. By prohibiting the judge from commenting on pending criminal cases in accordance with Canon 3A(8), the Court avoided the possibility of undue influence on the judicial process and the threat to public

confidence imposed by a judge criticizing the rulings or technique of a judge in the same or a sister jurisdiction in an ongoing proceeding. Because of the regular and repeated appearances by the judge on the programs, the Court also ensured that the judge did not lend the prestige of his office to the broadcasts in violation of Canon 2B.

In issuing its ruling, the Court noted that it was not imposing an absolute bar to judges appearing on commercial television programs nor prohibiting judges from commenting on court procedures or on cases that are no longer pending. The Court also directed its Advisory Committee on Extrajudicial Activities to begin to formulate standards to govern all such appearances in the future.

The New Jersey Supreme Court's decision is plainly in the mainstream of well-established judicial precedent in this area and is consistent with the rulings of every other state judicial ethics advisory committee which has addressed the question. Indeed, in his petition for a writ of certiorari, the petitioner is unable to point to a single case or precedent which supports his claim that the Canons do not prohibit his appearances.

Equally unpersuasive are the constitutional law arguments petitioner belatedly raises toward the end of his petition. The New Jersey Supreme Court's ruling plainly did not violate petitioner's First Amendment right to free speech. The limited restriction on the judge's comments imposed here clearly furthers the substantial governmental interest of avoiding material prejudice to an adjudicatory proceeding and preserving the independence and integrity of the judiciary. Further, the restriction is certainly no greater than is necessary to protect these interests and petitioner retains a wide variety of means to fulfill his desire to expound on the law.

Finally, the due process argument petitioner tacks on at the end of his petition is meritless. His contention that he was

entitled to a hearing was not even raised before the New Jersey Supreme Court. In any event, the Court permitted him to submit whatever arguments and proofs he wished to and to appear before it to orally argue the petition which he himself had instituted.

In sum, the New Jersey Supreme Court correctly decided this matter and the arguments raised by petitioner do not warrant review by this Court. Accordingly, the petition for certiorari should be denied.

## II. Procedural and Factual Background

Petitioner Evan W. Broadbelt has been a municipal court judge since 1982 and presently serves in five municipalities in New Jersey. Municipal court judges are appointed for three-year terms by the mayor or governing body of the municipality. N.J.S.A. 2B:12-4. A municipal court has jurisdiction over violations of local ordinances, violations of motor vehicle and traffic laws, disorderly persons offenses and other non-indictable offenses. N.J.S.A. 2B:12-17.

The conduct of municipal court judges, like all New Jersey judges, is governed by the Code of Judicial Conduct. The Code comprises seven Canons that provide guidance on the manner in which judges are to comport themselves. Matter of Seaman, 627 A.2d 106, 120 (N.J. 1993). "The ultimate and permeating objective of the [C]anons . . . is to maintain the integrity of the judiciary and public confidence in that integrity. Accordingly, the [C]anons evidence concern not only for the reality of judicial integrity, but for the appearance of that reality." Id. at 121.

Since 1992, petitioner has appeared over 50 times as a guest commentator on "Court TV" (App. 3a). Court TV is a commercial enterprise which, among other things, records and broadcasts ongoing court proceedings. During these broadcasts, and after having been identified as a judge,

petitioner would provide what he has described as "color commentary" on criminal trials then being conducted in various jurisdictions throughout the United States, including New Jersey (App. 3a).

Between November 1994 and March 1995, petitioner also appeared on the "Geraldo Rivera Live" program. (App. 3a). During the broadcasts on which he appeared, again prominently identified as a judge, petitioner's assignment was to provide commentary on the criminal trial in the case of State of California v. O.J. Simpson (App. 3a).

In December 1994, following an appearance on a third television program, "Legal Line," petitioner was contacted by the Assignment Judge for the vicinage, Hon. Lawrence M. Lawson, A.J.S.C. Judge Lawson advised petitioner that prior approval from him was required before any further television appearances (App. 3a). Judge Lawson also requested all municipal court judges in the vicinage to notify him before making any television or radio appearances (App. 54a).

After petitioner made two appearances on "Geraldo Live," on March 20, 1995, Judge Lawson advised petitioner that he had to "vitiate [his] prior approval of [petitioner] appearing on the 'Geraldo' show as a legal commentator" (App. 37a). After reviewing the Code of Judicial Conduct, Judge Lawson concluded that petitioner's commentary on pending trials as a New Jersey municipal court judge on behalf of these commercial enterprises violated Canon 2B ("A judge should not lend the prestige of office to advance the private interests of others...") and Canon 3A(8) ("A judge should abstain from public comment about a pending or impending proceeding in any court...") (App. 37a-38a). By letter dated March 20, 1995, petitioner informed Judge Lawson that he disagreed with his determination (App. 40a-42a). On that same date, Judge Lawson referred the matter to the Advisory Committee on Extrajudicial Activities for review (App. 43a-45a).

The Advisory Committee on Extrajudicial Activities (hereinafter "the Committee") was appointed by the New Jersey Supreme Court in March 1984 "to undertake a comprehensive study of permissible activities for New Jersey judges outside of their strictly judicial functions and to develop criteria or guidelines to aid judges in avoiding ethical improprieties in fact and appearance in their off-the-bench lives." Guidelines for Extrajudicial Activities and Report of Supreme Court Committee on Extrajudicial Activities (Abridged), amended January 1995. Judges may address inquiries concerning extrajudicial activities to the Committee. R. 1:18A-2. The Committee reviews the inquiry and renders an opinion if concurred in by a majority of its members. If the judge disagrees with the opinion, he or she may seek review of the opinion before the New Jersey Supreme Court. R. 1:18A-7.

On March 31, 1995, petitioner filed an inquiry for the Committee's consideration (App. 46a - 53a). In a letter dated April 18, 1995, the Committee Secretary advised petitioner that the Committee had met and had determined to disapprove petitioner's continued appearances on the commercial broadcast programs to discuss ongoing trials (App. 36a). The Committee advised petitioner that an advisory opinion would be issued after its next formal meeting (App. 36a). Before the Committee's meeting, however, petitioner filed his petition for review with the Supreme Court challenging the Committee's letter of April 18, 1995. (App. 83a - 102a).

On June 23, 1995, the Committee Secretary sent petitioner an "Advisory Letter" (Opinion #13-95) (App. 34a - 35a). This Opinion advised petitioner that the Committee had considered his inquiry again at its meeting on June 16 and had determined "to ratify its previous vote to disapprove your appearance on Court TV and Geraldo Live" (App. 34a). The Opinion explained that "[t]he Committee was of the view that such appearances would not be appropriate under the relevant portion of Canon 2 (a judge should not lend the prestige of

office to advance the private interests of others)" (App. 34a - 35a).

In a Corrected Order dated July 5, 1995, the New Jersey Supreme Court granted petitioner's petition for review of Opinion #13-95 (App. 33a). After giving petitioner the opportunity to supplement the record, brief and orally argue the matter, the Court issued its opinion on October 10, 1996 (App. 1a - 32a). 146 N.J. 501, 683 A.2d 543.

Like the Advisory Committee, and every other state court and judicial ethics committee which has examined the issue, (App. 7a - 13a, 19a - 21a), the New Jersey Supreme Court held that a sitting judge could not regularly appear on commercially-sponsored television broadcasts to provide commentary on pending criminal trials. The Court found that this commentary violated Canon 3A(8), which states that "[a] judge should abstain from public comment about a pending or impending proceeding in any court ...." (App. 5a - 15a). By prohibiting judges from commenting on pending cases, the Canon "avoid[s] the possibility of undue influence on the judicial process and the threat to public confidence posed by a judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction" (App. 14a). Because such commentary during the course of a criminal proceeding "could affect outcome .., appear to exert pressure on [a] judge to decide a certain way, and ... undermine public confidence in judicial decisions," the Court ruled that petitioner's appearances were "inappropriate and had the potential to compromise the integrity of the judiciary in New Jersey" (App. 14a - 15a).

The New Jersey Supreme Court also found that petitioner's commentary violated Canon 2B, which forbids a judge from "lend[ing] the prestige of office to advance the private interests of others...." (App. 15a-16a). Here, the purpose of petitioner's regular appearances on the programs he affiliated himself with was to "balance out" the numerous

defense attorneys who also regularly appeared on the broadcasts. 141 N.J.L.J. at Index Page 2270. Because of the frequency of petitioner's appearances, the Court found that he "became regularly identified with the program, thereby lending it the prestige of his judicial office" (App. 22a).

In finding that petitioner's repeated appearances to comment on pending trials were prohibited by the Code of Judicial Conduct, the New Jersey Supreme Court was careful to note that not all television commentary by a judge would be improper. For example, a judge could, consistent with Canon 3A(8), make statements in the course of his or her official duties, make comments concerning court procedure or discuss a case that is no longer pending (App. 8a). Canon 2B would also not bar a judge from making appearances from time-to-time on both public and commercial television programs to comment on the law (App. 22a). The Court directed its Advisory Committee to begin to formulate standards to govern all such appearances in the future (App. 23a).

The New Jersey Supreme Court also rejected petitioner's claim that his First Amendment rights had been unreasonably restricted (App. 25a). Noting, as every court which has examined this issue has done, that limitations may be placed on a judge's First Amendment rights (App. 25a), the Court determined that the rule the United States Supreme Court had applied to restrictions on an attorney's speech in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) should be applied here. Under the Gentile middle-tier scrutiny test, which the New Jersey Supreme Court had previously applied to attorneys in In re Hinds, 449 A.2d 483 (N.J. 1982), a regulation will be found constitutional if it (1) furthers an important or substantial governmental interest unrelated to the suppression of expression and (2) is no more restrictive than necessary to protect the governmental interest involved (App. 26a - 30a). The Court found that the avoidance of material prejudice to an adjudicatory proceeding, the need to preserve the independence and integrity of the judiciary, and the need

to maintain public confidence in the judiciary "-- the interests underlying Canons 3A(8) and 2B -- are obviously interests of sufficient magnitude to sustain those Canons under the Gentile/Hinds standard...." (App. 30a). The Court also found "that the restrictions on a judge's speech imposed by those Canons are no greater than necessary" (App. 30a - 31a). Therefore, the Court upheld "the constitutionality of their application to [p]etitioner," and affirmed Opinion No. 13-95 of the Advisory Committee (App. 31a).

## ARGUMENT

**THE SUPREME COURT LACKS JURISDICTION TO CONSIDER PETITIONER'S STATE LAW CLAIMS AND, IN ANY EVENT, PETITIONER HAS FAILED TO MEET THE STANDARDS FOR A GRANT OF CERTIORARI BECAUSE THE STATE COURT DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT AND THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.**

Petitioner seeks review of the New Jersey Supreme Court's decision pursuant to 28 U.S.C. §1257 (Pet. at 3). Under that statute, however, certiorari may only be granted: (1) where the validity of a federal treaty or statute is drawn in question; (2) where the validity of a state statute is drawn in question on the ground of it being repugnant to federal law, or (3) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority

exercised under, the United States." As the discussion which follows demonstrates, petitioner has failed to meet any of these criteria.

Petitioner's main contention is that his conduct (regularly appearing on commercial television broadcasts for the purpose of providing "color commentary" on pending trials), did not violate the Code of Judicial Conduct adopted by the New Jersey Supreme Court. The Code, however, was adopted by the State Court pursuant to its state constitutional authority. See N.J. Const. (1947), Art. 6, §3. The issue of whether petitioner's conduct violated the Code was therefore purely one of state law in an area where the states have been given wide discretion. See Gruenburg v. Kavanagh, 413 F. Supp. 1132, 1135 (E.D. Mich. 1976) (A state that creates a judicial office may set standards of conduct for the judicial officer. The right to hold a judicial office derives from state constitutional and statutory provisions, not the federal constitution or laws), c.f. Pincham v. Illinois Judicial Inquiry Bd., 872 F.2d 1341, 1347 (7th Cir. 1989), cert. den. 493 U.S. 975 (1989) (A state has a vital interest in preserving a fair and impartial judiciary capable of maintaining the respect of its citizens and a federal court should therefore abstain from considering a challenge to state judicial disciplinary procedures). This issue does not raise a federal question, involve the validity of a federal statute or treaty, or implicate a right, privilege or immunity set up or claimed under the United States Constitution. Therefore, the Court does not have jurisdiction under 28 U.S.C. §1257 to consider this issue.

Moreover, the arguments raised by petitioner are almost entirely factual in nature. Thus, he contends that his specific conduct, as a factual matter, was not sufficient to justify the State Court's finding that he had violated the Code (Pet. at 10 - 18; 22 - 24). The Court, however, will generally deny certiorari in a case where, as here, review is sought of a lower court decision which turns solely upon an analysis of

the particular facts involved. United States v. Johnson, 268 U.S. 220, 227 (1925). Accordingly, petitioner's claims that the state court's findings were not supported by the record do not warrant the granting of certiorari.

With regard to the First Amendment and due process arguments petitioner raises later in his brief, it is a fundamental concept that review by the Court on writ of certiorari "is not a matter of right, but of judicial discretion." Supreme Court Rule 10. Given such discretion, it has been the long standing practice of the Court to grant the writ "only for compelling reasons." Ibid. Further, the Court will generally grant certiorari from a state court determination only where the state court has decided an important federal question of first impression or in a way which conflicts with relevant decisions of the Court. Id.

None of these reasons exist in this case. The New Jersey Supreme Court's decision is in harmony with that of every other court which has considered the constitutional issues raised by petitioner. Indeed, in his petition, petitioner cites only those cases relied upon by the State Court in its opinion. Thus, no issues of first impression are presented in the petition and the State Court's decision is consistent with the decisions reached by the other courts which have considered similar matters. Because the Court lacks jurisdiction over the state law issues raised in the petition and because the federal issues raised by petitioner are insubstantial, the petition for certiorari should be denied.

A.

**BECAUSE PETITIONER WAS A SITTING JUDGE WHO WISHED TO PROVIDE "COLOR COMMENTARY" ON PENDING CRIMINAL TRIALS, THE NEW JERSEY SUPREME COURT CORRECTLY HELD THAT HIS REGULAR APPEARANCES ON COMMERCIAL TELEVISION PROGRAMS FOR THIS PURPOSE VIOLATED CANONS 3A(8) AND 2B OF THE CODE OF JUDICIAL CONDUCT.**

Petitioner devotes most of his petition to his contention that the New Jersey Supreme Court incorrectly held that he violated the Code of Judicial Conduct. Certiorari, however, is not appropriate where the party filing the petition seeks to challenge only the correctness of the lower court's decision. Ross v. Moffitt, 417 U.S. 600, 616-17 (1974). This is particularly the case where, as here, the primary issue raised deals solely with state law, i.e., the application of the Code to petitioner's conduct. Certiorari should therefore be denied in this case because no federal issue is presented.

Moreover, the New Jersey Supreme Court correctly held that petitioner's commentary on pending criminal trials violated Canon 3A(8) of the Code of Judicial Conduct (App. 5a - 15a). That Canon provides that

> [a] judge should abstain from public comment about a pending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's

> direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

The purpose of this Canon is clear. As former Justice Brennan wrote, in explaining the wisdom of judges abstaining from making comments on their decisions:

> A great Chief Justice of my home State was asked by a reporter to tell him what was meant by a passage in an opinion which had excited much lay comment. Replied the Chief Justice, "Sir, we write opinions, we don't explain them." This wasn't arrogance – it was his picturesque, if blunt, way of reminding the reporter that the reasons behind the social policy fostering an independent judiciary also require that the opinions by which judges support decisions must stand on their own merits without embellishment or comment from the judges who write or join them. [Address by William J. Brennan, Jr., Student Legal Forum, Charlottesville, Va., Feb. 17, 1959, cited in Westin, "Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw," 62 Colum L. Rev. 663 (1962).]

If it is unwise for a judge to comment upon the decisions he or she has rendered in contemporaneous, yet closed, cases, there is an even more compelling need to prohibit a judge from speaking about pending cases because of the great danger such comments pose to the integrity of the judicial system. The American Bar Association counterpart to New Jersey's Canon 3A(8) was drafted in response to the Court's decision in Sheppard v. Maxwell, 384 U.S. 333 (1966), where the Court reversed the murder conviction of the defendant because "massive, pervasive and prejudicial publicity" had deprived the defendant of his right to a fair trial. Gross, "Judicial Speech: Discipline and the First Amendment," 36 Syracuse L. Rev. 1181, 1229-30 (1986). The risk of damage to the integrity of the proceeding being commented upon is plainly present whenever the participants in the proceeding learn of and are potentially affected by, the comments of outsiders to the matter. This risk is only heightened where the person making the commentary is a sitting judge in the same or a sister jurisdiction because the remarks of such a commentator would naturally be expected to carry more weight than those of a lay commentator or even an attorney. Therefore, by barring judges from commenting upon any pending matter in any court, Canon 3A(8) seeks to preserve the integrity and impartiality of the judicial process.

The New Jersey Supreme Court's decision that Canon 3A(8) prevented petitioner from providing commentary on pending criminal proceedings is clearly in accord with the decisions issued by other courts which have examined the issue (App. 7a - 12a). See,e.g., Ryan v. Commission on Judicial Performance, 754 P.2d 724 (Cal. 1988) (judge who among other things, made statements to the press concerning a pending contempt order held to have violated the Canon); In re Benoit, 523 A.2d 1381 (Ma. 1987) (judge who wrote to a newspaper to defend a sentence he had imposed violated the Canon; United States v. Garwood, 16 M.J. 863 (A.C.M.R. 1983), aff'd 20 M.J. 148 (C.M.A.), cert. den. 474 U.S. 1005 (1985) (judge who expressed opinions on tactical decisions by

the defense crossed the line between permissible and impermissible commentary).

New Jersey's treatment of the issue is also directly in the mainstream of action taken by other state judicial ethics committees. Thus, for example, in Opinion 93-133, the New York Advisory Committee on Judicial Ethics considered the question of whether a judge could participate as an unpaid commentator on Court TV to make observations and offer comments on pending actions (App. 12a). Considering this issue, which is identical to the issue presented in this case, the New York Committee concluded that "[r]emarks made by the judge could...be seen as lending a judicial imprimatur to legal positions being advanced by one of the parties in an existing legal action, which legal positions may not have yet been ultimately determined" (App. 12a). Therefore, the Committee held that this activity could not be permitted. And, as the California Judicial Conduct Handbook so aptly declares in its discussion of that state's prohibition on a judge commenting on pending cases:

> In regard to comment on cases pending in another court, judges must avoid the unseemly spectacle of commenting on others' cases. Such comments could affect the result, or be seen by the judge before whom the case is pending as public judicial pressure to decide the case in a certain way. It also undermines public confidence in the decisions of the court. [App. 14a - 15a.]

Because petitioner's appearances on Court TV and other broadcasts required that he comment on pending criminal trials, the New Jersey Supreme Court correctly hold that petitioner's appearances were barred by Canon 3A(8).

In his brief, petitioner does not cite a single precedent to support his view that a sitting judge should be permitted to offer "color commentary" on pending criminal trials. Instead, he first asserts that the New Jersey Supreme Court should not have considered Canon 3A(8) because its Advisory Committee had only referred to Canon 2B in finding petitioner's conduct to be prohibited (Pet. at 10-11). In making this argument, however, petitioner overlooks the fact that he, himself, had advised the Supreme Court in his petition that "[t]he relevant Canon ... to be reviewed for this inquiry is Canon 3. Specifically in question is the provision contained in Canon 3A(8)...." (App. 90a). Petitioner had also addressed Canon 3A(8) in his submissions to the Advisory Committee (App. 48a - 50a), and in his correspondence to his Assignment Judge (App. 42a). Even if he had not placed Canon 3A(8) squarely in issue in this case, it is well established that an appellate court may consider reasons for supporting a decision that were not cited by the tribunal below. Isko v. Planning Board of Tp. of Livingston, 238 A.2d 457 (N.J. 1968). Therefore, petitioner's contention that the State Court erred in considering Canon 3A(8) must be rejected.

Petitioner's alternate argument, that his conduct was not as "hysterical, disparaging, unprofessional or opinionated" as that of the judges in the cases cited by the New Jersey Supreme Court, also falls far short of the mark (Pet. at 11-17). According to petitioner, unless and until it can be demonstrated that his comments on pending criminal trials have affected the outcome of those proceedings, he may continue to make them. This contention was correctly rejected by the Supreme Court. It must be borne in mind that petitioner's commentary, by its very design, was not a mere abstract discussion of legal issues; it was tied directly to specific pending cases, and the issues involved in those cases. "The text and context of [Canon 3A(8)] do not, expressly or by necessary implication, carry with them the requirement that the statement be made with the intent to affect the outcome or to impair the fairness of a particular case." In re Schenck,

870 P.2d 185, 202 (Ore. 1994), cert. den. _____ U.S. _____, 115 S.Ct. 195 (1994) (Judge's comments concerning a case he had handled held to violate Oregon code of judicial conduct). For example, by commenting on pending trials, a judge can convey the impression to the public that judges make decisions without hearing all of the evidence, thus reducing the public's confidence in the judicial office. Such comments may also, rightly or wrongly, be perceived by the public as favoring one side or the other in an ongoing proceeding, again working against the goal of the Code to preserve respect for the judiciary.

This is plainly evidenced by the comments which petitioner made in this case (App. 103a - 127a). Although petitioner tries his best to put the best interpretation on this commentary (Pet. at 21-22), and to present only self-selected and carefully edited excerpts of his 50 regular appearances on Court TV, the context of his comments is nevertheless discernable. Thus, for example, in one of the excerpts selected by petitioner as "representative" of his appearances, he opined that a prosecutor's cross-examination of a defense witness was "very aggressive. This is probably a prosecutor's dream witness because there are so many opportunities to cross-examine" (App. 122a - 123a). In another instance, petitioner commented on how a particular prosecution expert witness appeared to look on the stand (App. 106a - 107a); in another, he declared that the defense in a pending case would not be "very happy" with a particular charge lodged by the prosecution (App. 108a - 109a). On yet another occasion, petitioner concluded that a judge had "clearly made a factual decision that he believed" a particular witness (App. 120a). Contrary to petitioner's argument, these are the same types of comments which the courts in the cases relied upon by the New Jersey Supreme Court found to violate the Canon.

In addition, the very reason that petitioner was asked to participate in these broadcasts was to bring a point of view to the proceedings. Indeed, the chief executive officer of Court

TV has stated that, because "prosecutors, unlike defense attorneys, usually are reluctant to serve as commentators, ...it is important to have judges in that role." 141 N.J.L.J. at Index Page 2270. "'If you have just defense lawyers, you have a stacked deck.'" Ibid. Petitioner's argument that his comments did not harm or have the potential to harm the judicial process must therefore be rejected. Moreover, as previously discussed, the type of factual issues sought to be raised by petitioner plainly do not warrant the grant of certiorari.

The New Jersey Supreme Court also correctly held that petitioner's regular appearances on Court TV violated Canon 2B (App. 15a - 25a). Canon 2 of the Code of Judicial Conduct requires judges to avoid impropriety and the appearance of impropriety in all activities. The commentary to that Canon notes:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety, and must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on personal conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

One of the specific restrictions imposed by this Canon is that "[a] judge should not lend the prestige of office to advance the private interests of others." Canon 2B. Like all of the other rules governing judicial conduct, this restriction must be broadly construed in keeping with its purpose of maintaining public confidence in the judicial system. Matter of Blackman, 591 A.2d 1339, 1343 (N.J. 1991).

Here, the New Jersey Supreme Court determined that petitioner's regular appearances, prominently identified as a municipal court judge, on these programs would advance the private interests of others, namely, the commercial broadcast entities for which he would provide commentary. These commercial enterprises obviously hope to make their programs more attractive both to the public and the advertisers they need to support them by having a sitting judge serve as a commentator. Thus, the judicial office is being used to benefit the private interests of these business concerns. This type of activity plainly violates Canon 2B.

Again, the New Jersey Supreme Court's decision concerning Canon 2B is completely in accord with decisions reached in other states (App. 19a - 23a). Thus, for example, in Opinion 94-17, the Judicial Ethics Advisory Committee of the Arizona Supreme Court ruled that a judge could not serve on the editorial advisory board of a magazine that featured medial issues aimed at professionals in the health service industry and the general public. The purpose of the advisory board would be to provide the publisher with a panel of experts, whose names and titles would be featured prominently in the publication, to support or contradict the points of view expressed by writers in published articles. The Committee held that this activity was "clearly proscribed by Canon 2B" because the "judge will clearly be identified as a judge of a particular court and will be lending the prestige of the judicial office to advance the private interests of others."

Similarly, the Advisory Committee on Standards of Judicial Conduct of the Supreme Court of South Carolina ruled, in Opinion No. 14-1991, that a judge could not appear on a local radio talk show to answer questions about the legal system posed by the public because this conduct would violate Canon 2B (App. 20a). As the Board held, "[i]n associating himself with the question and answer Radio Talk Show on a regular basis, the judge would clearly lend the prestige of his office to the advancement of the radio station, in an area

where the public perceives him to be an expert." (App. 20a - 21a).

Against this weight of authority, petitioner offers very little resistance. He maintains that his "color commentary" on pending criminal trials did not benefit Court TV (Pet. at 16-17). Yet, it is precisely because petitioner is a judge that his appearances are sought and, through his 50 appearances on its programs, he has clearly lent the prestige of his office to the network. Petitioner also asserts that the New Jersey Supreme Court did not explain why his conduct violated Canon 2B (Pet. at 16-17). The Court, however, expressly noted that "[b]ecause of the frequency of [petitioner's] appearances, [he] became regularly identified with the program, thereby lending it the prestige of his judicial office" (App. 22a).

Finally, petitioner argues that his conduct was permitted by Canon 4, which permits a judge to "teach concerning the law" (Pet. at 17-18). The flaw in petitioner's position, however, is his attempt to pigeon-hole his activity into a single Canon as opposed to judging the activity under all of the Canons that make up the Code of Judicial Conduct. It is well-established, and petitioner certainly cites no authority to the contrary, that even though a judge's comments may have some educational value, they are not permitted if they violate other Canons (App. 24a - 25a). See Schenck, supra, 870 P.2d at 202; In re Miller, 644 So.2d 75, 78 (Fla. 1994). Petitioner's contention must therefore be rejected.

In sum, petitioner has not presented a federal question warranting certiorari. The arguments he emphasizes in his brief are solely related to state law issues. Moreover, the State Court's resolution of those issues is completely in accord with the decisions reached in other states. Certiorari should therefore be denied.

**B.**

**THE APPLICATION OF CANONS 3A(8) AND 2B TO PETITIONER'S CONDUCT CLEARLY DID NOT VIOLATE HIS FIRST AMENDMENT RIGHT TO FREE SPEECH.**

More than halfway through his petition, petitioner raises the same First Amendment argument he had unsuccessfully presented to the New Jersey Supreme Court (Pet. at 18-23). This issue, however, is neither novel nor important and the State Court's decision is in harmony with those of other state courts. Indeed, petitioner does not, and indeed can not, dispute that no court has ever "sustained an argument that a judge is excused entirely by the First Amendment from complying with the Canons of Judicial Conduct." In re Fadeley, 802 P.2d 31, 44 (Ore. 1990). As the Supreme Court of Kansas stated in In re Inquiry Relating to Rome, 542 P.2d 676, 684 (1975):

> Although a judge has the right of free speech, that right, like those of nonjudicial persons, is not without limits. In taking his office a judge assumes added responsibilities and is held to a higher standard of conduct that the lay person. For a judge the right to speak freely is circumscribed by the code of judicial conduct, just as that of the lawyer is subject to the code of professional responsibility, and first amendment rights do not exempt a judge from discipline for proven judicial misconduct.

In Rome, the court found that the need to preserve the integrity of the judicial office through the state code of judicial conduct outweighed a judge's alleged First Amendment right to issue an order written in verse that mocked and degraded a defendant in a proceeding handled by the judge. 542 P.2d at 684. Similarly, in Schenk, supra, the Oregon Supreme Court rejected a claim that the First Amendment excused a judge from complying with the state canons of judicial conduct. 870 P.2d at 203-206. In Schenk, the judge had authored "a letter to the editor" and a "guest editorial" concerning a pending proceeding. Id. At 200. Finally, in Matter of Hey, 452 S.E.2d 24 (W. Va. 1994), the West Virginia Supreme Court found that a judge's comments about his own judicial discipline proceedings on a radio broadcast did not violate that state's code of judicial conduct. 452 S.E.2d at 33. The court, however, specifically noted that, consistent with the First Amendment, "speech" which does violate the code of judicial conduct or which concerns a pending or impending matter, may be regulated. Id. at 31-33.

In the present case, the New Jersey Supreme Court determined that Canons 3A(8) and 2B should be reviewed under the middle-tier scrutiny test applied by the Court to attorney speech in Gentile, supra. (App. 28a - 30a). Under that standard, which petitioner does not dispute is applicable of him (App. 19a - 21a), "the regulation of a judge's speech will be upheld if it furthers a substantial governmental interest unrelated to suppression of expression, and is no more restrictive than necessary." (App. 30a). The Canons at issue here and their application to petitioner plainly meet that test. The purpose of the Canons is to preserve the independence and integrity of, and maintain public confidence in, the judiciary. The Canons also avoid actual as well as potential material prejudice to ongoing adjudicatory proceedings. All of these are prime examples of governmental interests sufficient to uphold the restriction imposed here.

The restriction on regular appearances to comment on pending criminal trials is also no greater than necessary. A judge remains able to make statements in the course of his or her official duties, to comment on court procedure, to comment on completed cases and to make appearances that do not amount to regular appearances which lend the prestige of the judicial office to the broadcaster (App. 8a; 22a). The New Jersey Supreme Court has also asked its Advisory Committee to begin to formulate guidelines governing such appearances (App. 23a).

In response, all that petitioner raises is his petition is an argument that his specific conduct did not have the potential to affect the outcome of the pending criminal trials he commented on. As discussed above, however, petitioner's argument is not supported by the record which demonstrates that petitioner commented on such matters as witness credibility, the strategy of the parties and possible judicial bias in ongoing cases. Such statements clearly had the potential to cause prejudice to the ongoing proceedings. Moreover, an intent to interfere in the proceeding is not required to bring the Canons into play. Schenk, supra, 870 P.2d at 202. The New Jersey Supreme Court therefore correctly applied the Canons to petitioner.

In sum, the First Amendment issue petitioner raises has been the subject of prior judicial opinions, all of which are consistent with the New Jersey Supreme Court's decision in this case. Plainly, therefore, certiorari should be denied.

C.

**PETITIONER'S DUE PROCESS CLAIM WAS NOT RAISED BELOW AND, IN ANY EVENT, PLAINLY LACKS MERIT.**

Toward the end of his petition, petitioner alleges that the New Jersey Supreme Court violated his due process rights by finding that he had violated Canons 3A(8) and 2B. He maintains that, before making such a finding, the Court was required to provide him with notice of the charge and a hearing (Pet. at 24-28).

Petitioner's contention is totally without merit. As petitioner is forced to concede in his petition, he raised no due process issue before the New Jersey Supreme Court (Pet. at 7). Because the issue was not raised in that forum, it may not be considered by the Court. Singleton v. Wolff, 428 U.S. 106, 120 (1976).

In addition to never requesting a hearing, petitioner nowhere explains the proposed purpose of such a hearing. Here, the facts of the matter were undisputed as were the facts which petitioner himself presented to the State Supreme Court (App. 3a). Petitioner had the opportunity to present documents to both the Advisory Committee and the State Court. He also clearly knew the Canons which were being applied to him because he, himself, had advised the Court that those were the Canons which should be considered (App. 83a - 99a). Petitioner also had the opportunity to file legal briefs and to orally argue his position before the Supreme Court. The contention that petitioner did not receive the process due him is groundless.

Plaintiff's alleged due process rights were plainly not violated by the New Jersey Supreme Court's decision in this

case. Due process considerations are only implicated where an individual's property or liberty interests are at issue. Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972). Several courts have taken the view that judges do not enjoy a property or liberty interest in their judicial office. See Gruenburg v. Kavanagh, supra, 413 F. Supp. at 1135; In re Del Rio, 256 N.W.2d 727 (Mich. 1977), app. dism. 434 U.S. 1029 (1978). O'Neil v. Baine, 568 S.W.2d 761, 768 (Mo. 1978). But, even if petitioner has a property interest in his judicial office, the New Jersey Supreme Court's decision that his commentary did not comport with the Canons did not effect any deprivation of that interest. Contrary to petitioner's claim, the court's decision did not constitute a "public admonition" of him (Pet. at 27). While the Court did find that petitioner "violated" the Canons, it did so in response to petitioner's own inquiry as to "whether his continued appearance on various televised commentary shows was violative of Canon 2B...." (Pet. at 8) (Emphasis added). Petitioner was not subject to public reprimand, was not suspended or demoted, received no public or private discipline, and was not otherwise deprived of any of the emoluments of his office in any way. Under these circumstances, petitioner cannot be heard to complain that he has been deprived of a property right in his official position.

Nor can petitioner successfully contend that he was deprived of a liberty interest. A deprivation of a liberty interest may occur where there is damage to one's standing in the community or where the state's conduct has imposed a stigma or other disability on an individual. Board of Regents v. Roth, supra, 408 U.S. at 573. An individual's good name and reputation alone, apart from some more tangible interest such as employment, however, do not implicate any liberty interest sufficient to invoke the procedural protections of the due process clause. Paul v. Davis, 424 U.S. 693 (1976); Bishop v. Wood, 426 U.S. 341, 348 (1976).

Here, petitioner has not been deprived of a liberty interest. Nothing has been "published" by the New Jersey Supreme Court which could even remotely be interpreted as affecting petitioner's reputation or standing in the community. Indeed, as petitioner has not hesitated to note several times in both his petition and in his public statements about the Court's decision, the Court stated in its decision that he was "a well-respected municipal judge" (Pet. at 9, 23; App. 3a). This is hardly consistent with a claim of a deprivation of a liberty interest. Petitioner's contention should therefore be rejected.

## CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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